Filed 3/10/09 P. v. Townsend CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CECIL TOWNSEND, JR., Defendant and Appellant.	B206187 (Los Angeles County Super. Ct. No. BA250166)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry P. Fidler, Judge. Affirmed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

_____

On December 21, 2006, we rendered our decision in case No. B186647, a prior appeal in this matter from the judgment entered upon Cecil Townsend, Jr.'s convictions by jury of five counts of oral copulation (Pen. Code, § 288a, subd. (c)(2), counts 1, 4, 5, 9 & 13),[1] four counts of forcible rape (§ 261, subd. (a)(2), counts 2, 6, 10 & 14), two counts of robbery (§ 211, counts 11 & 15), two counts of false imprisonment (§ 236, counts 8 & 16) as lesser included offenses of kidnapping (§ 209, subd. (b)(1)), and one count each of attempted second degree robbery (§§ 664, 211, count 7) and assault with a deadly weapon (§ 245, subd. (a)(1), count 12). The jury also found to be true in connection with each of the sex offenses, the allegation that appellant personally used a dangerous or deadly weapon or firearm in the commission of the offense within the meaning of section 667.61, subdivision (e)(4), in connection with counts 1, 2, 5, 6, 9, 10, 13, and 14, the allegation that the offense was committed against multiple victims within the meaning of section 667.61, subdivision (e)(5), and, with regard to counts 7, 11 and 15, the allegation that appellant personally used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1). The trial court sentenced appellant to an aggregate prison term of 222 years to life. We affirmed the judgment but modified appellant's sentence and remanded for resentencing consistent with our decision.

On remand, the trial court, sentenced appellant to an aggregate prison term of 106 years eight months to life, including a number of upper term and consecutive sentences. Appellant now appeals from the judgment entered upon his resentencing after remand. He contends that (1) imposition of the upper term sentences under Senate Bill No. 40 violated his rights under the Sixth and Fourteenth Amendments to the federal Constitution to a determination by the jury beyond a reasonable doubt of all facts necessary to increase his sentence beyond the statutory maximum, as set forth in *Cunningham*,[2] (2) imposition of consecutive sentences violated his rights under the Sixth

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

and Fourteenth Amendments to the federal Constitution to a determination by the jury beyond a reasonable doubt of all facts necessary to increase his sentence beyond the statutory maximum, as set forth in C*unningham*, and (3) this matter must be remanded for the trial court to recalculate his pre and post sentence custody credits.

We affirm with directions.

FACTUAL AND PROCEDURAL BACKGROUND

A. The facts

Appellant's convictions of sexual and other offenses arose from his sexual attacks on five prostitutes, or women believed by him to be prostitutes. The facts pertaining to appellant's offenses against these women are set forth in detail in our decision in the prior appeal, case No. B186647. Because this appeal raises issues pertaining solely to appellant's resentencing on remand from that prior appeal, we need not restate those facts.

B. Prior appeal

In appellant's prior appeal, we determined that the trial court erroneously sentenced him to 25-years-to-life terms on counts 1, 2, 5, 6, 9, 10, 13, and 14 because such sentences were authorized under the one-strike sentencing scheme in section 667.61 only where two or more of the circumstance set forth in subdivision (e) of that section were proved. After the trial court correctly concluded that the jury's true finding under section 667.61, subdivision (e)(4) was invalid, there remained only one subdivision (e) circumstance that had been proved. Therefore, a sentence of 15-years-to-life, not 25-years-to-life, was the maximum authorized. We also determined that the trial court erroneously sentenced appellant to a 15-years-to-life sentence on count 4 under the one-strike law because none of the circumstances in section 667.61, subdivision (e) had been established with regard to that count. We further concluded that the trial court erred in sentencing appellant to multiple life terms for each of the four victims for whom he was convicted of both rape and oral copulation because subdivision (g) of section 667.61 provides that a life sentence could be imposed only once for any offenses committed against a single victim "during a single occasion." (§ 667.61, subd. (g).) Finally, we

rejected appellant's contention that the requirement of subdivision (d) of section 667.6 that "full, separate and consecutive sentences" be imposed for convictions of forcible rape and oral copulation deprived him of his right to a jury determination beyond a reasonable doubt of all facts necessary to increase his sentence beyond the statutory maximum and to due process, as articulated in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

We modified appellant's sentence to provide a term of 15 years to life on counts 1, 5, 9, and 13 and remanded for resentencing "under any other applicable law, other than the one-strike law, on counts 2, 4, 6, 10, and 14." (Prior decision, p. 18.)

C. Resentence on remand

On remand, the trial court reduced the sentences on counts 1, 5, 9, and 13 from 25 years to life to 15 years to life, as we instructed. It then sentenced appellant to the upper term of eight years on count 4, designating it as the base term. On counts 2, 6, 10, and 14, on which appellant was originally sentenced to 25-years-to-life terms, it imposed full, consecutive upper term sentences of eight years each. It sentenced appellant to concurrent middle term sentences of two years each on counts 8 and 16. On count 8, appellant had originally been sentenced to a consecutive term of one-third the middle term, or eight months, and count 16 had originally been stayed pursuant to section 654. As it did in its original sentencing, the trial court imposed on count 7 a consecutive term of one year eight months, which was one-third the middle term of two years plus one year for the personal use of a deadly weapon enhancement, on count 12 a consecutive term of one year, which was one-third the middle term, and on counts 11 and 15 consecutive terms of two years, which were one-third the middle terms of three years plus one year for the deadly weapon enhancement. The aggregate sentence was thus 106 years eight months to life. The trial court declined to recalculate appellant's custody credits.

DISCUSSION

I. Constitutionality of upper term sentencing under Senate Bill No. 40

All of the offenses of which appellant was convicted in this matter were committed in 2002 and 2003. He was originally sentenced on September 28, 2005, and

was resentenced on February 8, 2008, after remand from this court in case No. B186647. The trial court purported to resentence appellant under Senate Bill No. 40 (Stats. 2007, ch.3, § 3, (Sen. Bill No. 40)), which had been signed by the governor as an emergency measure effective March 30, 2007.

The trial court stated its reasons for imposing the upper term sentences, as follows: "Well, I will state that I believe that certainly the Senate Bill No. 40, which was passed after various changes in the law, gives me the authority to, if I set forth the reasons, to pick other than the mid-term in this matter. The Court pursuant to [California] Rules of Court [rule] 4.421, in looking at the factors in aggravation, certainly the crime involved great violence, great bodily harm, the threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. I am not going to use that [appellant] was armed with the use of a deadly weapon. I think that might be a dual use of facts. I am a little concerned about that given the other findings that the jury made. The matter [*sic*] in which the crime was carried out that does indicate planning, sophistication, and professionalism. It's very clear, I think, that the victims were picked because of who they were and the likelihood that they wouldn't report the crimes because of their own criminal activity, and I also will use [appellant] was on probation or parole when the crime was committed. The underlining [*sic*] facts aren't so important."

Appellant contends that imposition of the upper term sentences under Senate Bill No. 40 violated his federal constitutional rights to a jury trial and proof under the Sixth and Fourteenth Amendments, as set forth in *Cunningham.* He argues that his crimes were all committed before adoption of Senate Bill No. 40 and therefore applying that statute to him violates the proscription against ex post facto laws and due process. This contention is without merit.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held that a defendant had a constitutional right to have the jury, not the trial judge, decide all facts that increase the penalty for a crime beyond the prescribed statutory maximum, except for prior convictions. (See also *Blakely, supra,* 542 U.S. at p. 301; *Cunningham, supra,* 549 U.S. at p. 288.) In *Cunningham,* the high court

concluded that because California's determinate sentencing law (DSL) "authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* at p. 293, fn. omitted.) The court held that the middle term in California's DSL was the relevant statutory maximum for the purpose of applying *Apprendi* and its progeny.

In response to *Cunningham*, the California Legislature passed Senate Bill No. 40 which amended section 1170 to eliminate the presumptive selection of the middle term of imprisonment. Instead, section 1170 now provides that the trial court has discretion to select the upper, middle or lower term.[3]

Appellant presents numerous arguments as to why application of Senate Bill No. 40 as applied here violates the ex post facto prohibition. But our Supreme Court has addressed this issue in dicta in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). The court opined that a sentencing scheme such as that enacted by Senate Bill No. 40 "'create[s] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment . . . and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause.'" (*Sandoval, supra,* at p. 854.) The court also said that "the removal of the provision calling for imposition of the middle term in the absence of any aggravating or mitigating circumstance is not intended to—and would not be expected to—have the effect of increasing the sentence for any particular crime." (*Id.* at p. 855.)

"Although dicta of the California Supreme Court does not control our decisions, it 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic. [Citations.]' [Citation.]" (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.) The *Sandoval* court's ex post facto analysis is

---

[3] Section 1170, subdivision (b), as amended, now provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected. . . ."

logical and compelling when considered in light of the pertinent authorities. Based on the reasoning in *Sandoval,* we are compelled to reach the same result.

The court in *Sandoval* also concluded that the changes in the DSL as a result of Senate Bill No. 40 would comply with the mandates of *Cunningham* because "the United States Supreme Court repeatedly has made clear in the line of decisions culminating in *Cunningham* that it 'ha[s] never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.] . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.'" (*Sandoval, supra,* 41 Cal.4th at p. 844.)

II. Constitutionality of consecutive sentencing

The trial court imposed consecutive determinate sentences on counts 1, 4, 6, 7, 10, 11, 14, and 15. Appellant contends that imposition of consecutive sentences based solely on the trial court's findings violated his right to a jury determination beyond a reasonable doubt. This contention is without merit.

The California Supreme Court has held that there is no federal constitutional right to a jury trial on factfinding relating to aggravating factors used to impose consecutive, rather than concurrent sentences. (*People v. Black* (2007) 41 Cal.4th 799.) We are bound by that determination. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Moreover, after the filing of the briefs in this matter, the United States Supreme Court in *Oregon v. Ice* (2009) __ U.S.__ [129 S.Ct. 711, 714-715] resolved this issue, holding that in light of historical practice and the states authority over the administration of the criminal justice systems, the Sixth Amendment does not prevent the states from assigning to judges rather than juries finding of facts necessary to imposition of consecutive rather than concurrent sentences for multiple convictions.

III. Custody and conduct credits

At the time of appellant's original sentencing, the trial court awarded him custody and conduct credits. At his resentencing hearing, the trial court refused to recalculate

appellant's custody credits. It apparently believed that the Department of Corrections was to do so.

Appellant contends that the trial court erred in failing to recalculate his custody credits up to the time of his resentencing. He requests that the matter be remanded for the trial court to make this calculation and issue a corrected abstract of judgment. Respondent agrees with appellant, as do we.

Our Supreme Court in *People v. Buckhalter* (2001) 26 Cal.4th 20, 29 stated: "[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody."

But "[n]either the language nor purposes of the credit laws oblige the trial court, on remand, to award good behavior credits applicable only to custody which precedes any sentence, commitment, and delivery to prison. [¶] On the contrary, once a convicted felon has been so sentenced, committed, and delivered, he remains, pending a remand solely on sentencing issues, a prisoner in the custody of the Director under the original commitment, even during periods when he is temporarily housed away from state prison to permit his participation in the remand proceedings. Hence, the inmates accrual of term-shortening sentence credits can arise only under laws and rules specifically applicable to prisoners in the Director's custody." (*People v. Buckhalter*, *supra*, 26 Cal.4th at pp. 29-30.)

We therefore remand this matter to the trial court to calculate appellant's actual days of custody credits both before his original sentencing and from the time of his original sentencing until his resentencing.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court to recalculate appellant's custody credits, both before the original sentencing and after that sentencing through the date of his resentencing, and to correct the abstract of judgment accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ